

Concise Explanatory Statement (RCW 34.05.325(6))
Amendments to WAC 192-320-035

Reasons for Rules:

The proposed amendments implement HB 1338 (Ch. 83, Laws of 2009). The new law broadens the ability of the Commissioner of the Employment Security Department to waive application of the higher tax rate for delinquent employers if the employer acted in good faith and application of the higher tax rate would be inequitable. The rule provides standards for the Commissioner to apply in determining whether to waive the higher tax rate for delinquent employers.

Differences from Proposed Rules Published in CR-102:

Summary:

Clarifies that standard of review specified in the WAC applies only to administrative proceedings, not to judicial review.

Clarifies and allows resolution of potential conflicts between paragraphs (3)(b) and (3)(c) by stating that disqualifications from waiver in (3)(b) apply "in the usual course of business."

Allows waiver of the delinquent tax rate following resolution of an appeal by entering into a payment plan as well as by paying in full.

Differences do not make the adopted rule "substantially different" from the proposed rule for purposes of RCW 34.05.340.

(1) In WAC 192-320-035(3)(a), in the last sentence, after "subject to" and before "review" insert "administrative" and after "reversed" insert "in administrative proceedings"

The purpose of this amendment is to conform with RCW 50.32.120 and RCW 34.05.570, which specify the standard of review to be used for judicial review. The standard of review specified in the WAC is to be applied only to administrative review, such as before the Office of Administrative Hearings or Commissioner's Review Office.

(2) In WAC 192-320-035(3)(b), after "find" insert "in the usual course of business"

The purpose of this amendment is to allow resolution of potential conflicts between paragraphs (3)(b) and (3)(c). For example, if an employer is delinquent because of inaccurate information from the department on the amount of a tax credit (under paragraph (3)(c)(i)), the employer should not be charged the delinquent rate even if it had been late in filing twice in the previous eight quarters (under paragraph (3)(b)(i)). The intent of this amendment is to preserve the general rule that the department would not waive the delinquent tax rate for employers that fall under paragraph (3)(b), but

allow limited discretion for exceptions when the delinquent tax rate would clearly be inequitable.

(3) In WAC 192-320-035(3)(c)(iii), after “due” insert “or the department approves a deferred payment contract within thirty days of the final resolution of the amount due”

The purpose of this amendment is to allow the department and employer to enter a payment plan following resolution of an appeal instead of requiring payment in full within thirty days. For example, an audit may have found that ten workers were misclassified as independent contractors instead of employees and that the employer owed taxes for those employees. There is a good faith disagreement over this classification and the employer appeals. The final determination of the adjudicating body is that five were independent contractors and five were employees. Taxes are not due during the pendency of the appeal, but become due retroactively once the appeal is resolved. Even though taxes were due on the five employees prior to September 30, the proposed rule provides that it may not be equitable to charge the delinquent rate if the employer timely pays once the amount of taxes due has become certain. This amendment to the proposed rule allows greater flexibility so that the department and employer may agree to a deferred payment contract (payment plan) as an alternative to payment in full.

Comments Received on Proposed Rules Published in CR-102:

None at public hearing. Written comments were received from Judith A. Endejan, Graham & Dunn PC, on behalf of Wyndham Vacation Resorts, but later withdrawn.

Art Wang, Special Assistant for Unemployment Insurance Tax & Wage, presented a written statement at the public hearing explaining differences (2) and (3) above.

Submitted by Art Wang, Special Assistant for Unemployment Insurance Tax & Wage
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